

# ETHICAL AND POLITICO-JURIDICAL NORMS IN THE *TUGENDLEHRE*

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## Abstract

Kant's view of the relation between ethical and politico-juridical norms has been debated in the literature, especially his view in the *Rechtslehre*. Apart from the exegetical question about the accurate interpretation of Kant's practical philosophy, at stake is also the general issue of the kind of politico-juridical normgiving we think we should have in our society. I have claimed that the fundamental positions in the literature on Kant can be reconciled, and, on the basis of Kant's claims in the Introduction to the *Metaphysics of Morals*, I have argued that ethical principles formulate in a complex way certain requirements that politico-juridical principles will have to meet in order to be appropriate principles for a society. I have also shown that the direct independentist position, according to which politico-juridical principles cannot be derived from the ethical ones, holds only when we regard principles from the perspective of subjective validity. In this paper, I examine the relation between ethical and politico-juridical principles on the basis of Kant's claims in the *Tugendlehre*. My claim is that the interpretation of his view needs to be adjusted in order to accommodate his claims in the *Doctrine of Virtue*. We will end up with an even more complex relation; on this revised interpretation, Kant would still regard politico-juridical principles as dependent in a complex way on ethical principles, but only on a specific subset of ethical principles. This will mean that the other ethical principles will not ground politico-juridical principles; the latter will be independent from the former, and this will be additional support for the independentist position.

## Keywords

Immanuel Kant, Marcus Willaschek, *Tugendlehre*, normativity, ethics and right, normative dependence

## 1. Introduction

Kant's practical or moral philosophy has two parts: an ethical and a politico-juridical one.<sup>1</sup> Both are concerned with the formulation of principles which can guide action. The formulation or giving of ethical principles (ethical normgiving) includes the specification of the motivation with which ethical principles are to be acted upon, namely, because we think acting on those principles is the right thing to do; 'rightness' here is to be understood in a moral sense and, hence, not as determined by contingent interests.<sup>2</sup> By contrast, the formulation or giving of politico-juridical principles (politico-juridical normgiving) does not include a specification of the motivation for action. In their case, contingent interests may provide the incentive, although we can also follow them because they are

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<sup>1</sup> As we will see, Kant draws this distinction in terms of ethical and juridical *lawgiving* [*Gesetzgebung*] (*MS*, AAVI 218). In citing Kant's works the following translations are used: for the *KrV*, I. KANT, *Critique of Pure Reason*, eds. Werner S. Pluhar, Patricia Kitcher, Indianapolis-Cambridge, Hackett, 1996; for the *KpV*, I. KANT, *Critique of Practical Reason*, in IDEM, *Practical Philosophy*, eds. Mary J. Gregor, Allen Wood, Cambridge, Cambridge University Press, 1996, pp. 137-271; for the *MS*, comprising the *RL* and the *TL*, IMMANUEL KANT, *The Metaphysics of Morals*, in IDEM, *Practical Philosophy*, pp. 360-603; for the *ZeF*, I-L KANT, *Toward Perpetual Peace*, in IDEM, *Practical Philosophy*, pp. 311-52.

<sup>2</sup> For instance, if I keep my promise to you, because I happen to fancy you, then my action depends on the contingent fact of my fancying you; if I keep my promise, because I made a promise to you, then this kind of contingency disappears. Of course, one could say that making a promise may be contingent too, but the aim here is not to find some absolutely necessary standard.

right.<sup>3</sup> For instance, you may want to refrain from lying in court, because you would like to avoid the possible punishment ensuing upon being caught. Yet, of course, you may also try to avoid any lies, because this is what you think the right thing to do is. In the case of an ethical principle, such as that of avoiding self-deception, if the action is to have any ethical worth, then it should be performed because it is the right thing to do; if you avoid self-deception, because you are afraid of the consequences of self-deception, then you are actually following a different principle, namely, a conditional principle which makes the avoidance of self-lying dependent on contingent factors – the consequences that happen to follow from self-deception and your wanting to avoid those consequences.

If any politico-juridical norm can be followed out of ethical considerations (and, as we have seen, Kant thinks they can), that is, because morally this is the right thing to do, then any politico-juridical normgiving can become ethical, where the motivation is specified as given by the rightness of the norm to be acted upon.<sup>4</sup> This, however, is a view which is often contested. Politico-juridical norms may be seen as responding to different, non-ethical requirements. They have been seen as establishing a framework of normative requirements, rather than having to respond to such requirements. Mixed views, according to which some politico-juridical norms are ethically right and other are not is also possible. Interestingly, Kant's own view of the relation between ethical and politico-juridical norms has been debated in the literature. Apart from the exegetical question about the accurate interpretation of Kant's practical philosophy, at stake is also the general issue of the kind of politico-juridical principle we think we should have in our society.

I have already argued for a particular view of the relationship between ethical and politico-juridical principles in Kant, a view which also seems to me philosophically convincing.<sup>5</sup> More exactly, on the basis of Kant's claims in the Introduction to the *Metaphysics of Morals*, I have argued for a complex relation of dependence between ethical and politico-juridical principles. Specifically, the claim has been that ethical principles formulate in a complex way certain requirements that politico-juridical principles will have to meet in order to be appropriate principles for a society. In what follows, I would like to examine this same relation in light of some of Kant's claims in the *Tugendlehre*. My contention is that the interpretation of his view of ethical and politico-juridical normgivings needs to be adjusted in order to accommodate his claims in the *Doctrine of Virtue*. We will end up with an

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<sup>3</sup> There is a distinction here between principles and normgivings or principle-givings; each of these, in their turn can be divided into ethical and politico-juridical principles/normgivings. Thus, the distinction between the ethical and the politico-juridical normative domains is not drawn in Kant only by reference to motivation. We can distinguish between an ethical and a politico-juridical principle even when we are not sure what the motivation with which principles are acted upon is. For instance, we can talk in Kant about specifically ethical lies. Lying to oneself is such an example. It is an intentional untruth, which cannot harm others. An intentional untruth which harms a particular person is a lie in the politico-juridical sense, whereas a lie which harms humanity in general is a lie in the sense of right. Hence, a principle of not lying to oneself can only be an ethical principle, whether I act on it with an ethical motivation (it is the right thing to do) or with a non-ethical motivation (I dread the slippery slope on which self-lying engages me). For further discussion on lying in Kant, see J. E. MAHON, *The Truth about Kant on Lies*, in *The Philosophy of Deception*, ed. C. W. Martin, Oxford: Oxford University Press, 2009; see also S. BAIASU, *Political Dissimulation à la Kant*, in *Sincerity in Politics and International Relations*, ed. S. Baiasu and S. Loriaux. London: Routledge, 2016 (in print).

<sup>4</sup> As we will see, for Kant, a politico-juridical norm which is acted upon with an ethical motivation becomes indirectly ethical. It is not simply ethical, since an ethical norm requires ethical motivation in order to have ethical normgiving, whereas a politico-juridical norm can be acted upon with a non-ethical motivation.

<sup>5</sup> See S. BAIASU, *Right's Complex Relation to Ethics in Kant*, «Kant-Studien», CVII, 1, 2016, pp. 2-33.

even more complex relation – on this revised interpretation, Kant would still regard politico-juridical principles as dependent in a complex way on ethical principles, but only on a specific subset of ethical principles. This will mean that the other ethical principles will not ground politico-juridical principles; the latter will be independent from the former.

Very briefly, the paper will be structured as follows. In the next section, I will outline the main interpretative positions on this issue in the literature on Kant. I will also present the complex relation of dependence that we can establish in Kant between politico-juridical and ethical normgiving, as discussed in the Introduction to the *Metaphysics of Morals*. In the third section, I will examine a powerful recent argument in support of the view that politico-juridical normgiving in Kant is independent from ethical normgiving; I will then evaluate this argument and argue that it is valid only for a limited perspective. Section 4 will examine some claims Kant makes in the *Tugendlehre*, which seem to be in tension with the account of complex dependency presented in the previous section; I will discuss the relation between ethical and politico-juridical normgiving by taking into account the way the complex dependency view is questioned by the *Doctrine of Virtue*. I will conclude by suggesting one question which remains open and which would be worth exploring.

Before moving on to the second section, let me present in more detail the argument of the paper. As Section 2 will show, there are several ways in which commentators understand the relation in Kant between ethical and politico-juridical normgiving. On one account, which can be called the simple or direct dependentist account, the formulation of politico-juridical norms is simply derived from the formulation of ethical norms as a specific case; we start with the set of ethical normgivings and conclude with a subset, which is the result of applying ethical normgiving to the politico-juridical domain. On another account, the complex dependentist account, politico-juridical normgiving can be derived from ethical normgiving, but not directly, by the simple application of ethical normgiving to the specific case of the politico-juridical domain. Finally, according to some interpreters, politico-juridical normgiving cannot be derived from ethical normgiving – the relation between them is of simple or direct independence.

In a previous paper, I have noted that these various interpretations are offered by very knowledgeable and subtle philosophers, which may suggest that, if there is a problem, it must be with Kant's text, rather than with the interpreters' arguments.<sup>6</sup> If Kant's position is contradictory or ambiguous, then it is easy to account for this variety of positions on an important issue such as that between ethical and politico-juridical normativity. I have then argued that, in fact, all these positions can in principle be reconciled, removing in this way the suspicion concerning the contradiction or tension in Kant's texts. My focus has been on a powerful recent argument, which tries to show precisely that there is a contradiction in Kant's account. More exactly, the contradiction is the result of three features which Kant identifies as present in politico-juridical norms. To solve the contradiction, the argument shows, one of the three features has to be abandoned, and this makes politico-juridical normgiving independent from ethical normgiving.

I have argued, however, that, in fact, all the argument for the independentist position shows is that ethical and politico-juridical normgiving are independent from the perspective of subjective validity, that is, from the perspective of the actual giving of norm that is associated with the agent's action. For instance, when an agent does not lie in court because she takes this to be the right thing to do,

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<sup>6</sup> S. BAIASU, *Right's Complex Relation to Ethics in Kant*.

she offers an ethical normgiving and she acts on an unconditional principle; by contrast, when she does not lie in court because, say, she would like to avoid the possible consequences of lying, then she acts on a conditional principle, which states that one should not lie, if one wants to avoid its possible negative consequences; in this case she offers a politico-juridical normgiving and she acts on a conditional principle. Hence, politico-juridical normgivings cannot be derived from ethical normgivings even in an indirect, complex way.

Hence, my argument showed that the independentist position was not really in contradiction with the complex dependentist one. Although I did not demonstrate the same for the direct dependency position, the argument I offered made a step towards a reconciliation of the three main positions. As mentioned, the argument in that paper relies mainly on Kant's claims in the Introduction to the *Metaphysics of Morals*. In this paper, I focus on some of Kant's claims in the *Tugendlehre*. I show that, on the basis of those claims, we can understand Kant as suggesting a distinction between two types of ethical normgiving: ethical normgiving of virtue and ethical normgiving which is not of virtue. Yet, my claim is that politico-juridical normgiving can be derived in a complex way only from ethical normgiving which is not of virtue.

One implication is that the complex dependentist account, which I favour, will only work for ethical normgivings which are not of virtue. A second implication is that the independentist position seems to apply in the case of ethical normgivings which are of virtue. In other words, independentism is not simply a position which would hold from the perspective of subjective validity, a perspective which is not Kant's, but it also applies within the framework of Kant's viewpoint, when we consider the relation between politico-juridical normgiving and ethical normgiving of virtue. One question which remains unanswered is whether, after all, it might not be possible to derive politico-juridical normgivings from *ethical* normgivings (that is, from ethical normgivings of virtue too). As I will indicate at the end, this is an avenue Kant seems to open up, but to examine it further goes beyond the scope of this paper.

## 2. The Relation in Kant between Ethical and Politico-Juridical Normgiving

Consider the following examples, which capture the major interpretative positions. First, according to Jürgen Habermas,

[h]e [Kant] starts with the basic concept of the moral law and obtains juridical laws from it by way of *limitation*. [...] This construction is guided by the Platonic intuition that the legal order imitates the noumenal order of a 'kingdom of ends' and at the same time embodies it in the phenomenal world.<sup>7</sup>

On this account, we seem to have a relation of simple dependence between the formulation or normgiving of the Categorical Imperative (henceforth, the CI)<sup>8</sup> and of the Universal Principle of Right

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<sup>7</sup> J. HABERMAS, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, (ed.) William Rehg, Cambridge, MS, the MIT Press, 1996, pp. 105-106.

<sup>8</sup> I use capitals ("Categorical Imperative") to refer to the meta-principle which Kant suggests can test maxims of action and small ("categorical imperative") letters to refer to maxims that have passed the test.

(henceforth the UPR): if politico-juridical principles<sup>9</sup> can be derived from the moral law by limitation, given that all politico-juridical principles can be derived from the UPR and that the CI is more general than the UPR, it seems the UPR itself can be derived from the CI by limitation.<sup>10</sup> On Habermas's reading, the CI turns out to be a general principle, from which we can derive the politico-juridical principles (usually justified by the UPR) by limiting the application of the CI to actions characterised by free choice, externality and enforceability. On this account, therefore, the UPR depends on the CI.<sup>11</sup>

Consider now Paul Guyer's view:

Strictly construed, the claim that Kant's principle of right is not derived from the Categorical Imperative, understood as the requirement to act only on maxims that can also serve as universal law, is correct because the principle of right [...] does not concern our maxims at all. [...] However, any broader claim that the principle of right is not derived from the fundamental principle of morality [...] is surely implausible.<sup>12</sup>

According to Guyer, a relation of simple dependence (such as that identified in Kant by Habermas) is not an accurate way of characterising Kant's position. For Guyer, the UPR cannot be derived from the CI, since the UPR does not have anything to do with maxims of actions; for the UPR, the motivation with which an action is performed is not relevant, whereas for ethical principles it is crucial. Therefore, Guyer's reading of the relation, in Kant, between the CI and the UPR rejects the simple dependence position offered by Habermas.<sup>13</sup> Yet he acknowledges that it would be implausible to deny a "broader claim" that the UPR is not derivable from the CI.

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<sup>9</sup> Although they do acknowledge Kant's distinction between norm and normgiving, the discussion of these commentators is usually conducted in terms of norms or principles, although they are mainly about normgiving. In what follows, I will follow these commentators' terminology, although it is worth bearing in mind that the claims are mainly about normgiving, that is, norm and motivation, rather than simply norms or principles.

<sup>10</sup> I take this to be quite a straightforward argument, which can easily be illustrated with an example of logical priority. If we have a series of statements about Siamese cats of the type "X is a feline" (where X is the name of a Siamese cat, say, X is Abby), then we can derive these statements from the more general statement "Cats are feline" (in the way in which we would derive politico-juridical norms from the CI). Given that all those statements can also be derived from the general statement "Siamese cats are feline" (in the way in which politico-juridical norms can be derived from the UPR) and that this statement is less general than that about mere cats, we can conclude that the statement about Siamese cats can be derived from that about mere cats by limiting the discussion to Siamese cats (hence, the UPR would be derivable from the CI).

<sup>11</sup> J. HABERMAS, *Between Facts and Norms*, pp. 105-106.

<sup>12</sup> P. GUYER, *Kant's Deductions of the Principles of Right*, in *Kant's Metaphysics of Morals. Interpretive Essays*, ed. Mark Timmons, Cambridge, Cambridge University Press, 2002, p. 26.

<sup>13</sup> A similar position can be found in A. RIPSTEIN, *Force and Freedom. Kant's Legal and Political Philosophy*, Cambridge, MS, Harvard University Press, 2009. For Ripstein, there must be a way of deriving the UPR from the CI in a broad sense, something Guyer also asserts in the quotation above: «Kant says that all duties are indirectly duties of virtue, that is, that there is an obligation of virtue to act on the principle of right, to make them your own principle of action. If that is correct, however, there must be some way of bringing them within the reach of the *Doctrine of Virtue* that is not at the same time a way of making right depend on virtue» (p. 358).

In Guyer's account<sup>14</sup>, in addition to a rejection of a simple dependence of the UPR on the CI, we can find the affirmation of a relation of relative<sup>15</sup> dependence between the UPR and the CI. Since this relation of dependence excludes a relation of simple dependence of the UPR on the CI, we can also call it a relation of relative independence of the two fundamental principles of Kant's moral theory.

Finally, consider this very clear statement from Allen Wood: "Kant very explicitly discredits the whole idea that the principle of right could be derived from the fundamental principle of morality".<sup>16</sup> We may no longer understand this as before: Wood is not simply rejecting a relation of simple dependence, in order to accept a relation of relative dependence; the rejection of the derivation of the UPR from the CI seems much stronger here: Wood seems to go further with the rejection of a relation of dependence: he also rejects a relation of relative dependence and supports simple independence:

It may be correctly said that Kant's theory of right falls under or can be derived from the principle of morality. That is, it may be said *insofar as juridical duties are regarded not merely as juridical but also as ethical duties*. Considered simply as juridical duties, however, they belong to a branch of the metaphysics of morals which is *entirely independent* of ethics and also of its supreme principle.<sup>17</sup>

Wood makes here reference to the following claim, which Kant formulates in the Introduction to the *Metaphysics of Morals*, section IV:

Ethics has its special duties as well (e.g., duties to oneself), but it also has duties in common with right; what it does not have in common with right is only the kind of *obligation*. [...] So while there are many *directly ethical* duties, internal lawgiving makes the rest of them, one and all, indirectly ethical.<sup>18</sup>

On Kant's account, when a duty of right is acted upon with an ethical motivation (that is, because it is the right thing to do), then it becomes a duty of virtue too, and, hence, any duty of right is indirectly ethical. Wood notes therefore that the UPR may be derivable from the CI,<sup>19</sup> but only

<sup>14</sup> And also in Ripstein's account. This view appears also in B. LUDWIG, *Whence Public Right? The Role of Theoretical and Practical Reason in Kant's Doctrine of Right*, in *Kant's Metaphysics of Morals*. According to him, this "general principle" [the Universal Principle of Right] obviously stems in some way from the Categorical Imperative, the "supreme principle of the doctrine of morals" (p. 159). And he adds: «[...] [W]e have to take seriously Kant's numerous claims that the *Rechtslehre* is an inseparable part of his *metaphysics* of morals, and cannot be detached from the latter's foundations» (p. 170). Here Ludwig puts emphasis on a relation of dependence of the UPR on the CI. Yet, again, this is not going to be a simple relation of dependence. The derivation of the UPR from the CI will happen in «some way», and the UPR, the fundamental law of the *Rechtslehre*, is part of the metaphysics of morals, but the link will not be a direct link of simple derivation.

<sup>15</sup> In what follows, I will use 'relative', 'indirect' and 'complex' interchangeably in the expressions 'relative dependence', 'indirect dependence' and 'complex dependence'. Similarly for 'absolute', 'direct' or 'simple' when they qualify 'dependence' or 'independence'.

<sup>16</sup> A. WOOD, *The Final Form of Kant's Practical Philosophy*, «The Southern Journal of Philosophy», XXXVI, 1, 1997, pp. 1-20, p. 6.

<sup>17</sup> Ivi, p. 8.

<sup>18</sup> MS, AA VI 220-221.

<sup>19</sup> He actually says the «principle of morality» and, insofar as he means by this the moral law, this can be problematic; but, if he means the CI, then he is right to point out that the UPR cannot simply be derived from the CI. Another supporter of the independentist position is Marcus Willaschek. Section 3 will focus on some aspects of his account.

insofar as the UPR is seen as justifying not simply politico-juridical duties, but (indirectly) ethical duties. As issuing simply politico-juridical duties, the UPR is supposed to be “*entirely independent*” of the CI.

We have, therefore, a reading of Kant in which the relation between the UPR and the CI is viewed as a relation of simple independence, a view that contrasts clearly with the previous readings of the relation as of simple or relative dependence. I have said that these positions need not be irreconcilable and that I have shown elsewhere how the direct or simple independentist position can be reconciled with the indirect (relative or complex) dependentist view. In this paper I would like to make a step further and to show how this compatibility between seemingly distinct and irreconcilable positions appears from the perspective of some of Kant’s comments in the *Doctrine of Virtue*. One important distinction for my purpose is the distinction Kant draws between law (or norm) and lawgiving (or normgiving), a distinction I introduced in Section 1 of this paper, and on which I will focus in more detail in the remainder of this section. The distinction will also enable us to understand what kind of derivation (as specified by commentators, “in a broad sense”) of the UPR from the CI can be found in Kant.

According to Kant (in Section IV, “On the Division of a Metaphysics of Morals”, of the *Metaphysics of Morals*),

In all lawgiving [...] there are two elements: *first*, a law, which represents an action that is to be done as objectively necessary, that is, which makes the action a duty; and *second*, an incentive, which connects a ground for determining choice to this action subjectively with the representation of the law. Hence, the second element is this: that the law makes duty the incentive. By the first, the action is represented as a duty, and this is a merely theoretical cognition of a possible determination of choice, that is, of practical rules. By the second, the obligation so to act is connected in the subject with a ground for determining choice generally.<sup>20</sup>

Kant says explicitly that each lawgiving [*Gesetzgebung*] or normgiving<sup>21</sup> has two parts: a norm and an incentive. The norm represents an action, which, as represented by the law, is objectively necessary and, hence, a duty. The incentive connects a ground for determining choice with the representation of the norm and the connection takes place *subjectively*. Without the incentive, the norm presents a theoretical cognition of a possible determination of choice (practical rule). That is, without a motive to perform the action represented by the norm, the norm formulates a duty, which presents itself to me as a possible action represented by a possible rule of action, but towards which I feel no motivation to act.

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<sup>20</sup> MS, AA VI 218.

<sup>21</sup> I talk about *norms*, rather than laws or imperatives, because Willaschek argues that the expressions ‘juridical imperative’ and ‘imperative of right’ are misnomers (M. WILLASCHEK, *Which Imperatives for Right? On the Non-prescriptive Character of Juridical Laws in Kant’s Metaphysics of Morals*, in *Kant’s Metaphysics of Morals*, p. 71 n11). He argues against Otfried Höffe’s use of the notion of a categorical imperative of right and he himself prefers to talk about juridical laws. Given the distinction between law and imperative, I avoid the use of ‘law’. Instead of ‘law’ (which seems to me inappropriate) or ‘imperative’ (which Willaschek regards as a misnomer), I use ‘norm’ or sometimes ‘principle’.

Hence, for Kant, the norm is independent from the incentive with which I act on it. I may, for instance, think of a situation and formulate a principle of not lying as a possible principle on the basis of which to act. According to Kant, depending on the kind of incentive with which we act on that norm, we can end up with the following types of normgiving or lawgiving:

All lawgiving can therefore be distinguished with respect to the incentive [...]. That lawgiving which makes an action a duty and also makes this duty the incentive is ethical. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself is juridical. It is clear that in the latter case this incentive which is something other than the idea of duty must be drawn from pathological determining grounds of choice, inclinations and aversions, and, among these, from aversions...<sup>22</sup>

Kant's point here is quite clear: if a norm, as an element of normgiving, is acknowledged by an agent as objectively necessary, then it can be given as a norm to be followed either solely in virtue of its objective validity or not solely in virtue of its objective validity or necessity (for instance, in virtue of an aversion, presumably to punishment). In the former case, that is, when the norm is given as to be followed because this would be the right thing to do, Kant identifies an ethical type of normgiving. In the latter case, that is, when norm is not given as to be followed solely with the ethical motivation (but, say, in order to avoid punishment), Kant talks about juridical or politico-juridical normgiving.

In acting on an ethical principle, we are expected to have as incentive the fact that the principle is right and it is our duty to act on it. Hence, in following the CI in this case, we must have the appropriate (that is, ethical) motive. The formulation of the CI as a principle or meta-principle of action provides us with an ethical normgiving. By contrast, in acting on a politico-juridical norm, we need not be motivated by duty. Therefore, in acting on a politico-juridical principle, we follow the UPR even when our incentive is fear of punishment. The normgiving here is politico-juridical.

Kant's distinction between the norm and the incentive of a normgiving makes room conceptually for an indirect deduction of the UPR and its politico-juridical principles from the CI and its ethical principles, a deduction or derivation which can also explain the commentators' claims that the UPR can be derived from the CI only in a "broad" sense. There are at least two ways to carry out this deduction, although they lead to the same result. First, we can arrive at a relation of relative dependence between the UPR and the CI by two moves; secondly, we can derive both the UPR and the CI from a more general principle. Both of these are arguments in support of the same relation of complex dependence between the CI and the UPR.

Consider the first way: we can start with the ethical normgiving of the CI and those of the ethical principles it justifies; in a first move, we can apply the condition of enforceability (including for instance externality) and we end up with a more limited set of ethical normgiving; given Kant's distinction between norm and incentive, we can separate (and this is the second move) the ethical incentive from this more limited set of ethical normgiving and we then end up with enforceable

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<sup>22</sup> *MS*, AA VI 218-219.



principles which may either be acted upon with an ethical incentive or with a non-ethical incentive; by definition, however, these are the politico-juridical principles derived from the UPR.<sup>23</sup>

The same result would obtain if followed in the second way: we start with the CI (which, when we act on it, could be seen as a higher-order ethical normgiving) and we would separate the ethical incentive from it; we would then end up with a higher-order principle, which would be very similar with the CI, but would not include a requirement for the motivation with which it is acted upon: it can be acted upon out of duty or out of a 'pathological' incentive.<sup>24</sup> Subsequently, if we apply to this higher-order norm the requirements of enforceability and externality, we will end up with the UPR.

This clarification can also be taken as a justification of the complex dependentist position, which I take to be the correct interpretation of Kant in this context. In other words, the two ways of deriving the UPR from the CI show equally well how the UPR is dependent in an indirect, complex or relative manner on the CI. Yet, such a justification will also raise the question of the motivation for the other two positions, namely the simple dependentist and simple independentist positions. In a sense, an answer is already available. As I said, the complex dependentist position claims that the UPR can be derived indirectly from the CI. This implies that the UPR cannot be derived directly from the CI. Hence, the relation of complex dependence is also a relation of indirect independence. As a result, we could say that both the interpretation which reads Kant as offering a relation of direct dependence and that which interprets him as defending a relation of direct independence sound more plausible. This is because, if I am right and the correct interpretation of Kant is the complex dependentist position, given that this is at the same time a relation of relative or complex or indirect independence, commentators who read Kant as offering a view of simple dependence or of simple independence can be understood as making only a mistake about the nature of the relation. Thus, Habermas, as defender of a direct dependentist position is not wrong when he reads the relation as one of dependence, but when he thinks it is a simple or direct relation of dependence. Similarly, when he reads Kant as defending a direct independentist position, Wood is not wrong about the fact

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<sup>23</sup> There are various features which distinguish between ethical and politico-juridical norms or principles; according to some commentators, one obvious feature is the externality of politico-juridical norms. If politico-juridical norms are to be enforced by the executive power, then they need to refer to actions which are external; it is not possible to enforce an action to which the enforcer does not have access, since there is then no way of determining whether the action was actually performed or not – such an action, however, is not enforceable. There are, however, actions which are external, but they may not be accessible, since they take place in the public sphere. Such actions cannot be enforced, since, again, the executive power cannot monitor whether they are being performed or not. Finally, there are actions which are external and their performance can be monitored, but cannot be enforced, since there is no incentive which can outweigh the incentive to break them. For instance, a principle or norm of not killing an innocent person may be easily dismissed if two persons survive a shipwreck and there is only one plank. I think the distinction between politico-juridical and ethical norms can be made by reference simply to enforceability; enforceability presupposes the ability to provide an incentive that would balance the incentive to break the rules; it also presupposes the ability to monitor the performance of the action; finally, it presupposes access to the performance of the action and, hence, externality.

<sup>24</sup> Although I think I claimed in the past that the resulting higher-order norm would be the moral law, I now think this is incorrect. Usually, the moral law is distinguished from the CI on the basis of a distinction between human beings like us (who need commands, that is, imperatives) and perfectly rational beings (who act on the moral law, because it is the right thing to do and without any opposed pathological incentives). This means, however, that the moral law is actually always acted upon (by the perfectly rational beings) from the motive of duty. By contrast, the higher-order norm obtained by separating the CI from the ethical motivation does not have any incentive.

that the relation between ethics and right in Kant is a relation of independence; he is wrong about its direct or simple character.

But we can make a step forward and find a limited sense in which the relation of direct independence is correct as a construal of Kant's view of the link between the UPR and the CI. This will be the focus of the next section.

### 3. An Independentist Argument

The argument in support of the independentist position starts from a paradox. Briefly stated, the paradox is that, although it seems that the notion of a politico-juridical norm implies prescriptivity, politico-juridical norms cannot be prescriptive. As I have mentioned, the argument is offered by Willaschek, who, in a series of texts, defends imaginatively and persuasively the independentist position.<sup>25</sup> Here I would like to provide only very briefly an outline of his argument, in order to specify what, according to my earlier analysis, I considered to be the limit of independentism. As we will see, then, the picture becomes even more complicated, since, on the basis of some of Kant's claims in the *Tugendlehre*, it turns out independentism is a position whose validity is even broader than I initially acknowledged.

According to Willaschek, a categorical command has the features of prescriptivity and unconditionality. First, politico-juridical principles are prescriptive in the sense that they tell us what we ought, or ought not, to do. Arbitrary detention, for instance, is prohibited in most democratic countries at least in theory; irrespective of how the 'ought' is accounted for,<sup>26</sup> this prohibition indicates that we ought not to detain a person arbitrarily. Secondly, politico-juridical principles are unconditional, because they do not bind only those who share certain ends, but everyone. We do not tax only those who may benefit from the alleviation of extreme poverty, but everyone.

In addition, a politico-juridical principle or norm, as opposed to an ethical one, has also the condition of externality. A politico-juridical norm is external in the sense that it only requires legality, not morality: it only requires that we act in accordance with the norm, whether or not we act in this way because we take the norm to be right. The condition of requiring only legality is related to the feature of externality in the following way: outward behaviour in accordance with a principle gives

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<sup>25</sup> I have in mind here mainly the following texts by Willaschek: M. WILLASCHEK, *Why the "Doctrine of Right" does not belong in the "Metaphysics of Morals"*. On some basic distinctions in Kant's moral philosophy, «Jahrbuch für Recht und Ethik», V, 1997, pp. 205-227; *Which Imperatives for Right?; Recht ohne Ethik? Kant über die Gründe, das Recht nicht zu brechen*, in *Kant im Streit der Fakultäten.*, eds. Volker Gerhardt, Thomas Meyer, Berlin, de Gruyter, 2005; *Right and Coercion: Can Kant's Conception of Right be Derived from his Moral Theory?*, «International Journal of Philosophical Studies», XVII, 1, 2009, pp. 49-70; and *The Non-Derivability of Kantian Right From the Categorical Imperative*, «International Journal of Philosophical Studies», XX, 4, 2012, pp. 557-564. I cannot do justice to these rich and thought-provoking texts within the confines of this article. Apart from some references to some of these texts, here I will mainly focus on M. WILLASCHEK, *Which Imperatives for Right?*

<sup>26</sup> On one positivist account of the normativity of politico-juridical norms, what makes a norm authoritative is the fact that it is enforced; so, when there is the necessary political power to enforce a norm, that norm becomes authoritative and can prescribe a prohibition, commission or permission. On some other accounts, the norm's authority must precede its enforcement in order for this to be legitimate. Hence, the normativity of the norm, which makes it prescriptive, is justified prior to and as a necessary condition for enforcement.

the resulting action legality; if the action needs also to be performed with a particular motive, then we introduce an inner condition, a condition having to do with the person's ultimate ground for performing the action. I cannot monitor a person's motivation. On the basis of a person's actions, I may perhaps form a hypothesis concerning her intention. This is a legitimate enterprise, since a person's intention gives me some indication about her outward behaviour.

Suppose I claim my intention was to return to you by the agreed date a substantial amount of money you were so kind to lend me; it will then seem strange that I also bought a plane ticket to a remote island with departure on the eve of the agreed date and that I transferred all my money to an offshore account. Assuming that an intention is established, the question of motivation is the question of the ground of the action which is supposed to realise my intention; assuming some crucial evidence is found to confirm my honourable intention, questions remain about my motivation: did I intend to do this or that because I thought it was the right thing to do, because I wanted to avoid complications or because I am so constituted that paying a debt gives me immense pleasure? As opposed to action and even intention, motivation is inner, because no outer indication can be a reliable source of evidence for my motivation, as the ultimate ground of my action.

Consider now the following way of looking at a principle: when I actually act on a principle, I consider that principle as valid – I have adopted this principle as my principle of action and I have acted on it.<sup>27</sup> Hence, for me, the principle is valid. Were it not to be valid for me, I would not have adopted it. Were my outward behaviour to be in accordance with the principle as a result of chance, without any intention on my part to act in that way, we would not call that my 'action'. When we look at a principle in this way, we are considering its subjective validity. As it will become clearer shortly, Willaschek's argument needs to adopt this perspective if it is to be successful.

Consider a politico-juridical norm which has subjective validity for me, and, hence, I act on it. If my action and normgiving has legality and morality (if I act in accordance with the norm and because I take the norm to be right), then the normgiving is ethical. If my action and normgiving has legality, but my ultimate ground in acting in this way was, say, wanting to avoid something I regard as detrimental, then the normgiving through which I actually act is that of acting in a particular way in order to avoid detrimental consequences. This means that, in the first case, my politico-juridical principle turns into ethical normgiving, whereas, in the second case, it becomes part of a politico-juridical normgiving whose norm is hypothetical or conditional.

It is by adopting this perspective that Willaschek can argue that, as part of a politico-juridical normgiving, a norm cannot be categorical and, hence, unconditional, but must be hypothetical. This is because, from the perspective of the subjective validity of the norm, as we have seen, a politico-juridical principle, if it is to remain part of a politico-juridical normgiving must be acted upon with a non-ethical motivation. But if I perform an action in accordance with a principle in order to, say, avoid punishment, then, from the perspective of the principle's subjective validity, the actual norm

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<sup>27</sup> It may seem that the phenomenon of weakness of will is a counterargument to this. I may act on a principle even when I think I should have acted on a different one. Hence, acting on principle X does not necessarily reflect my view that the principle is valid, given that I think Y is in fact valid for me. But a simple answer here can be the following: either I was free to act on Y, and then I must have considered X as good for my action in some sense which overrode my reason for regarding Y as valid; or I was not free not to act on X, in which case it is not clear I acted on X, rather than being forced to move in a way which happened to be in accordance with X.

which guides me is the conditional one of acting in accordance with the norm when, by so acting, I avoid punishment.

To be unconditional, it would seem we would have to abandon one of the other two characteristics of a politico-juridical principle, namely, externality or prescriptivity. For instance, it may seem that an external principle which is not prescriptive may be unconditional in the sense that its validity would not depend on having a particular purpose; or it may seem that an inner principle would necessarily be unconditional, since there would be no further purpose apart from the rightness of the norm which would limit its validity. Yet, if we abandon externality, then there will be a restriction on the motivation with which I act on the principle and, acting for the sake of the principle's rightness will become a feature constitutive of the principle. But then a principle which is prescriptive, unconditional and must be acted upon with an ethical motivation is by definition an ethical principle.

This shows that, if we want our politico-juridical principle to be unconditional, the only option is that we abandon its prescriptivity, in order to keep its external character and, hence, its politico-juridical nature. The principle would need to be seen as descriptive; it will no longer obligate me, but would be seen as describing a possible course of action, to which I need not commit. This leads to Willaschek's conclusion, according to which politico-juridical principles (that is, external, unconditional and prescriptive principles) cannot be prescriptive.

What is interesting, however, is that not even this alternative would work, since it makes little sense to call this descriptive principle unconditional. As we have seen, the feature of unconditionality has to do with the character of the normativity the principle has – it is a matter of whether it obligates only those with particular ends or purposes, or it obligates all agents in the relevant circumstances. A descriptive principle does not obligate, so it remains unclear what kind of unconditionality we could attribute to it.

What this shows is that we cannot have genuine politico-juridical principles, that is, the same principle cannot be external, prescriptive and unconditional. If it is prescriptive and unconditional, then it is no longer politico-juridical, but it turns out to be ethical; if it is prescriptive and external, then it is no longer unconditional, but hypothetical. What this implies further is that politico-juridical principles cannot be really derived from ethical principles even in a complex or indirect way, since they are hypothetical, whereas ethical principles are categorical. If so, nor can the UPR be derived from the CI – whether in a direct or indirect way. Willaschek formulates this argument as a general argument which applies to all politico-juridical principles; as we have seen, however, the problem of politico-juridical, external, prescriptive and unconditional principles only applies when we focus on the principle's subjective validity.

If we focus on its objective validity, then the fact that I observe the principle out of fear of punishment no longer affects its validity – it can still be unconditionally valid, external and prescriptive. This is because the objective validity of the principle is no longer linked with how I take that principle to be normative for me. The principle is objectively valid when it is right; if I act on it because I would like to avoid punishment, then my ground of action is not its rightness, and this indicates, from the perspective of subjective validity, that I take this principle to be normative and I act on it *insofar as* this would help me to avoid punishment. The resulting normgiving includes a conditional norm. The objective validity of the norm, however, is not affected by the way I act on the norm. Hence, when acting on a norm, I may be motivated by its rightness or by fear of punishment;

hence, the politico-juridical norm can then be derived from the corresponding ethical norm in the complex way presented in Section 2.

Hence, politico-juridical norms are indeed independent from ethical norms, but only when we focus on their subjective validity; when we focus on their objective validity, the relation of complex dependence discussed in the second section applies. From the perspective of objective validity, politico-juridical norms, including the higher-order UPR can be derived from ethical norms, including the higher-order CI, first, by dissociating the norms from the normgiving and, then, by limiting the norms to the condition of externality. This was at least the conclusion of my previous argument. In the next section, we will see that, in fact, the relation in Kant between ethical and politico-juridical norms is even more complex than this.

#### 4. Some Claims in the *Tugendlehre*

Consider first the following passage from the *Tugendlehre*:

All duties involve a concept of *constraint* through a law. *Ethical* duties involve a constraint for which only internal lawgiving is possible, whereas duties of right involve a constraint for which external lawgiving is also possible.<sup>28</sup>

Here Kant draws a distinction with which we are already familiar from the discussion at the end of Section 2. At the end of Section 2 I provided a more detailed justification of the complex dependence interpretation. Recall that any normgiving has two elements: a norm, as an objectively valid claim, which formulates a duty, and an incentive or the motivation with which the norm is acted upon. The distinction between internal and external lawgiving is drawn by reference to the incentive or motivation with which one acts. In the case of external lawgiving, what is important is that external behaviour be manifested in accordance with the norm. In the case of internal lawgiving, what is essential is that action on the norm be performed because acting on the norm is the right thing to do.

Here, Kant notes that ethical duties are those duties which include constraints for which only internal lawgiving is possible; hence, in the case of ethical duties, the objectively valid norms can only be acted upon with an ethical motivation, that is, because acting on that norm is the right thing to do. By contrast, duties of right are those duties whose constraints (that is, objectively valid norm) can be acted upon both with ethical and non-ethical motivation.

Consider now a second quotation from the *Tugendlehre*:

Since the moral capacity to constrain oneself can be called virtue, action springing from such a disposition (respect for law) can be called virtuous (ethical) action, even though the law lays down a duty of right.<sup>29</sup>

First, Kant calls virtuous or ethical action that which springs from respect for law. This is in accordance with his discussion of ethical duties, which require ethical motivation (that is, the

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<sup>28</sup> *TL* AA VI 394.

<sup>29</sup> *Ibidem*.

motivation of respect for law). Secondly, he specifies that, even when the objectively valid norm is a duty of right (that is, a duty which can be acted upon with both an ethical and a non-ethical motivation), the action which results from acting upon the norm out of respect for law can still be called an ethical or virtuous action. This seems to re-assert the position of complex dependency: duties of right can be obtained starting from a corresponding ethical duty by removing the condition that its respective norm be acted upon with ethical motivation only and by allowing in this way that the norm be acted upon with both ethical and non-ethical motivation.

The picture starts to become complicated once we take into account the following claim by Kant: “But what it is virtuous to do is not necessarily a *duty of virtue* strictly speaking”.<sup>30</sup> Given that ethical duties necessarily lead to ethical or virtuous actions, and given that virtuous actions need not be the result of fulfilling a duty of virtue, it follows that some ethical duties may not be duties of virtue. Yet, since duties of virtue are ethical, it follows that ethical duties can be divided into two categories: ethical duties of virtue and ethical duties which are not of virtue. The problem is then that the complex dependentist position, which I claimed is best able to account for Kant’s view, needs further specification. Thus, according to the complex dependentist position, duties of right and also the UPR can be derived indirectly from ethical duties and the CI. Yet, if there are two types of ethical duties (duties of virtue and duties which are not of virtue), then it is unclear whether duties of right can be equally well derived indirectly from duties of virtue and from ethical duties which are not of virtue.

An answer can be formulated by looking at a final claim from the *Tugendlehre*. Thus, according to Kant:

What it is virtuous to do may concern only what is formal in maxims, whereas a duty of virtue has to do with their matter, that is to say, with an end that is thought as also a duty.<sup>31</sup>

As we have seen, for Kant, what it is virtuous to do (that is, virtuous or ethical action) is action springing from respect for law.<sup>32</sup> Ethical or virtuous action is action which is performed because it is the right thing to do. This concerns what is formal in maxims.<sup>33</sup> Duties of virtue, by contrast, are ethical virtues which are distinctive by the fact that they have to do with ends which are also thought as duties. One example of such an end is one’s own perfection. Kant regards it as a duty of wide obligation, since it is not prescribed specifically how far one should go in cultivating one’s capacities. Similarly, variations in how to cultivate one’s talents will depend on circumstances.<sup>34</sup> This is why, according to Kant, whereas ethics gives laws for maxims of action, right [*Ius*] gives laws for action.

If ethics gives laws for maxims and duties of virtue are duties to achieve a certain end which is also a duty, then duties of right cannot be derived from duties of virtue. As we have seen, a maxim of action, even one where the end is also thought as a duty, is compatible with many actions. In order

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<sup>30</sup> *Ibidem*.

<sup>31</sup> AA VI 395

<sup>32</sup> AA VI 394.

<sup>33</sup> As Kant puts it, «Like anything *formal*, virtue as the will’s conformity with every duty, based on a firm disposition, is merely one and the same» (AA VI 395). Insofar as the ethical or virtuous character of an action consists of the firm disposition which grounds the will’s conformity with every duty, duty is one and the same.

<sup>34</sup> AA VI 392.

for duties of right to be derivable from duties of virtue, we should have a way of specifying how the maxim can issue in specific narrow duties (that is, specific actions). We cannot specify exactly in what way one ought to act and how much one ought to do by the action.

If all this is correct, then we can infer several conclusions. Assuming ethical duties do ground duties of right in the way presented by the complex dependentist position and given that duties of virtue cannot ground duties of right, it follows, first, that it is only those ethical duties which are not duties of virtue that ground duties of right. Hence, duties of right can indeed be derived from ethical duties, but only from those which are not duties of virtue. Secondly, however, since there are ethical duties which cannot ground duties of right (namely, duties of virtue), the derivation of politico-juridical norms from ethical norms does not take place in virtue of the latter's ethical character.

Hence, one question which can be raised at this point is about the feature in virtue of which politico-juridical duties are derived from ethical duties. When we derive politico-juridical duties from ethical duties which are not duties of virtue, the fact that the latter are ethical is contingent, since there are also ethical duties from which we cannot derive duties of right. Hence, there must be some specific features of these ethical duties, apart from the fact that they are ethical, on the basis of which the derivation is possible. I will leave this question for another occasion, since it requires an investigation into the character of those ethical duties which are not duties of virtue, whereas the present paper focuses primarily on duties of virtue.

Thirdly, if duties of right or politico-juridical principles cannot be derived (even indirectly) from duties of virtue, it follows that independentism will hold beyond the perspective of subjective validity of norms, which the complex or indirect dependentist interpretation already acknowledges. An important point is the following: so far, independentism was acknowledged as correct for a certain *perspective* from which duties are to be regarded. More exactly, I have shown that independentism holds when we focus on the subjective validity of the norm acted upon. This meant that, as far as the norm's objective validity was concerned (this being the type of validity Kant seems most interested in), the complex dependentist position was the accurate interpretation. If the argument so far is correct, this conclusion needs to be changed: duties of right are independent from duties of virtue, whether we focus on the subjective or objective validity of the respective norm.

There may be further complications. I have shown that, on the basis of some of Kant's claims in the *Tugendlehre*, some ethical duties are not duties of virtue; yet, in the *Tugendlehre*, Kant says: «Ethical duties are of *wide* obligation» (AA VI 390). If we think that duties of wide obligation are duties of virtue, we can infer that ethical duties are duties of virtue after all. This suggests that perhaps we need to distinguish between various senses of 'ethical' in Kant. An alternative solution is to claim that *all* ethical duties are of wide obligation, including duties which are not duties of virtue. This much seems to be suggested by Kant's discussion at *TL* AA VI 391. Again, I am going to leave this issue (assuming the alternative solution is not working) for another paper.

## 5. Conclusion

I began with an outline of the three main positions in the literature on the relation in Kant between ethical and politico-juridical principles: the direct dependentist, complex dependentist<sup>35</sup> and direct independentist positions.<sup>36</sup> I have argued that the complex dependentist position is able to account for some of the important claims Kant makes in the Introduction to the *Metaphysics of Morals* about the relation between ethical and politico-juridical normgiving. Moreover, I have shown that, within the context of the *Rechtslehre*, one of the strongest arguments in support of the independentist position can be weakened by demonstrating that it functions only when norms are regarded from the limited perspective of their subjective validity. I have further argued that, once we move to the *Tugendlehre*, Kant's idea of an end which is at the same time a duty introduces further complexity in the complex dependency account. More exactly, Kant distinguishes between two types of ethical principles, which formulate duties: there are ethical duties of virtue and ethical duties which are not duties of virtue (since they are not ends, which constitute also duties). Since the complex dependentist position claims that ethical normgiving grounds politico-juridical normgiving, the question is whether both types of ethical duty are able to do this. My conclusion has been that the ethical normgiving of virtue cannot ground the politico-juridical normgiving and, hence, that the independentist view holds not only for norms regarded from the perspective of subjective validity, but also for norms which are constitutive of duties of virtue. This modifies somehow the picture, which in specific, but important ways is still unclear.

Thus, several questions remain, the answer to which might be telling for or against the complex dependentist view. One question is the nature of the ethical normgiving from which politico-juridical normgivings can be derived in an indirect way; as I said, what is specific for the ethical normgiving which is not of virtue, in their relation to politico-juridical normgiving, is not their ethical character, since normgivings of virtue are also ethical and, yet, politico-juridical normgivings cannot be derived from them. As second and related question concerns the extent to which, after all, it might not be possible, even indirectly, to derive politico-juridical normgivings from ethical normgivings (that is, from ethical normgivings of virtue). As we have seen, specific for a duty of virtue is the end that is thought also as duty. Kant thinks that only duties of virtue are imperfect (AA VI 390), which implies that only for duties of virtue there is a playroom for choice in complying with the law.<sup>37</sup> I took this

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<sup>35</sup> As I have shown, the complex dependentist position asserts that politico-juridical normgiving can be derived indirectly from ethical normgiving and, hence, that politico-juridical normgivings are not directly dependent on ethical normgivings. Because the complex dependentist position denies a relation of direct dependence, it asserts implicitly a relation of indirect independence. Hence, the complex dependentist position is also a complex independentist position.

<sup>36</sup> As a representative of the direct dependency position, I have mentioned Habermas, but, now, after a more detailed presentation of Kant's position, I should qualify this: it is not very clear Habermas does attribute this view to Kant; after all, he claims that Kant «starts with the basic concept of the moral law and obtains juridical laws from it by way of *limitation*». (J. HABERMAS, *Between Facts and Norms*, pp. 105-106) The claim that Habermas would support the direct dependency position needs to be qualified, because he talks about the moral law, not about the CI. Given Kant's distinction between the moral law and the CI, the moral law describes the way perfectly rational beings act and, hence, does not include a requirement concerning the motivation with which it should be acted upon. Hence, we can get to the UPR by limitation: in addition to externality, we also add the permission to act either with an ethical or with a non-ethical motivation. An examination of this issue is beyond the scope of this paper, but it is a step forward in the attempt to reconcile the direct dependentist, complex in/dependentist and direct independentist positions. But see also n. 24.

<sup>37</sup> «...the law cannot specify precisely in what way one is to act and how much one is to do by the action for an end that is also a duty» (TL, AA VI 390).



lack of specificity to be an indication that we cannot derive politico-juridical normgivings from ethical normgivings of virtue. But Kant also makes the following claim in the *Tugendlehre*:

The wider the duty, therefore, the more imperfect is a man's obligation to action; as he, nevertheless, brings closer to *narrow* duty (duties of right) the maxim of complying with wide duty (in his disposition), so much the more perfect is his virtuous action.<sup>38</sup>

Kant talks here about bringing closer to narrow duty the maxim of complying with wide duty, in order to make perfect the virtuous action. This suggests precisely a derivation of a narrow duty (a duty of right, as Kant specifies) from a duty of virtue. It is not clear, however, whether Kant has here in view such a derivation or only an attempt to get closer to a duty of right by moving the motivation of one's action closer towards an ethical one (as Kant puts it, "complying with wide duty (in his disposition)"). An answer to this question goes, however, beyond the scope of this paper.<sup>39</sup>

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<sup>38</sup> *Ibidem*.

<sup>39</sup> An early version of this paper was presented to the 2015 'Jean-Jacques Rousseau' Annual Conference organised at Keele University. I am grateful to members in the audience for illuminating discussion, in particular (chronologically, as questions were asked) to Kenneth Westphal, Alix Cohen, Dieter Schönecker, Elke Schmidt and Mark Timmons.